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IN THE

Supreme Court of the United States

October Term, 1970

No. 1600

COMPANIA DE NAVEGACIONE ALMIRANTE S.A., PANAMA, a Panamanian corporation,

Petitioner,

vs.

BEVERLY HILLS NATIONAL BANK, a National Banking Association,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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vs.

BEVERLY HILLS NATIONAL BANK, a National Banking Association,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Compania de Navegacione Almirante S.A., Panama, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit, rendered in these proceedings on January 20, 1971.

Opinions Below.

The opinion of the Court of Appeals, not yet reported, is attached as Appendix A, *infra*. The Order of the Court of Appeals denying rehearing is attached as Appendix B, *infra*. The opinion of the United States District Court, reported under the style *"Compania de Navegacione Almirante S.A. Panama v. Certain Proceeds of Cargo, etc., of the Vessel S.S. SEARAVEN; et al."* at 288 F. Supp. 77, 1968 A.M.C. 704, is attached as Appendix C, *infra*.

Jurisdiction.

The judgment of the Court of Appeals (Appendix A, *infra*) was entered on January 20, 1971, within 90 days of the filing of this petition. Jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §§1254(1) and 2101(c).

Questions Presented.

1. In determining whether the maritime lien for the shipowner for its unpaid charter hire attached to a particular and identifiable fund of money within the juisdiction of an admiralty court, may the holder of such fund, who is not a bona fide holder for value in due course, invoke a rule of law developed and applied to protect bona fide purchasers for value in order to defeat the maritime lien claim.

2. Does the failure of a shipowner to require the posting of security by consignees of cargo before discharge of such cargo constitute a waiver of the shipowner's maritime lien claim for its unpaid charter hire in circumstances where the shipowner has obtained security for its claim by the judicial process of maritime attachment in rem prior to the discharge of the cargo.

3. Can a court of admiralty grant equitable relief as between persons and as to subjects properly before it *ex proprio vigore* or only pendently to its exercise of jurisdiction over a traditional admiralty claim to enforce a maritime lien.

4. Was the court below justified in reversing findings of the trial court on the issues of waiver and unjust enrichment before it, and the conclusions of law of the trial court based thereon.

Constitutional Provisions Involved.

Article III, Section 2 of the United States Constitution:

> "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . .".

Statement of the Case.

Petitioner, Compania de Navegacione Almirante S.A., Panama, was plaintiff and appellee in the proceedings below and was, at the time alleged in the complaint, owner of the Panamanian vessel SEARAVEN. Beverly Hills National Bank, formerly Beverly Hills National Bank & Trust Company, was defendant and claimant to the in rem defendant in the trial court, and was sole appellant in the Court of Appeals. Judgment by default was entered against defendant Kenray, Inc. by the trial court. Kenray did not appeal and is not interested in these proceedings. In the proceedings below, petitioner was referred to as "Compania" and Beverly Hills National Bank was referred to as "The Bank". For ease of reference, the same practice will be followed in this petition.

Description of Proceedings.

Invoking the admiralty and maritime jurisdiction of the United States [28 U.S.C. §1333(1)], Campania filed a libel in rem and in personam on December 16, 1964 against the Bank, a fund styled "Certain Proceeds of Cargo, Freights and Subfreights of the Vessel S.S. SEARAVEN", and Kenray, Inc., charterer of SEARAVEN, seeking to enforce its maritime lien for charter hire against the defendant "Proceeds" and its claims for the same hire in contract against Kenray and in quasi-contract against the Bank. As noted

above, judgment by default was taken against Kenray which did not appeal the judgment. The Bank appeared both as an in personam defendant and as a claimant to the in rem defendant "Proceeds".

The trial court held, over objection by the Bank, that it had in rem jurisdiction over the "Proceeds" as well as admiralty jurisdiction to grant in personam relief against the Bank, holder of the "Proceeds." Following hearing, the court entered judgment, both in personam and in rem, against all defendants in the amount of Compania's unpaid hire. The Bank thereupon appealed to the Court of Appeals for the Ninth Circuit. The Court of Appeals confirmed the trial court's jurisdiction in rem over the "Proceeds," but went on to hold that Compania had waived its maritime lien therein. Turning to the equitable issues framed by the pleadings, the Ninth Circuit held that such issues did not lie within the trial court's admiralty jurisdiction, but could be considered as a matter of *pendent* jurisdiction[1] and that, so considered, equitable relief in Compania's favor was not proper. Accordingly, the judgment of the trial court was reversed.

Summary of Facts.

Kenray, an exporter of scrap metals, was heavily in debt to the Bank and had given the Bank a security interest in certain scrap metals owned by it. Following discussions between Kenray and the Bank on how best to liquidate the scrap metals and reduce Kenray's indebtedness, Kenray chartered SEARAVEN for a voyage from Los Angeles to Formosa, arranged enough

[1]The Court of Appeals also noted that the trial court had jurisdiction based on the complete diversity of the parties, 28 U.S.C. §1332.

additional cargo to fill out the vessel and sold the entire cargo of scrap, including that held in the Bank's name, to several Formosa buyers, payment to be by foreign letters of credit upon presentation of freight prepaid bills of lading.

The charter party [Ex. 1] called for the bills of lading to be marked "freight prepaid as per charter party" and to be issued on loading of the cargo with payment of 90% of the charter hire required seven days thereafter. The bills of lading were duly issued and, SEARAVEN having sailed, negotiated by the Bank which collected $535,371.21. When the Bank refused to disburse any of these funds, Kenray defaulted on its hire payment. Compania thereupon commenced suit, obtained an order of the court requiring that cause be shown why the monies collected by the Bank not be paid into the registry of court [R. 7] and perfected its jurisdiction in rem by service on the Bank on December 21, 1964 [R. 22]. Following hearing the district court affirmed its prior order and required a deposit in registry on January 25, 1965 [R. 55].

While these proceedings were going forward at Los Angeles, the SEARAVEN was still making her way to Formosa, having diverted to Honolulu for temporary repairs. The vessel finally arrived at Formosa and the cargo of scrap metal was discharged commencing February 18, 1965 [R. 222]. Compania did not require the Chinese consignees of cargo to post security for hire at the time of discharge[2] relying instead on the

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[2]Compania did require security for general average repairs at Honolulu, a fact considered significant by the Court of Appeals (*see* Appendix A, p. 4 *infra.*)

security already afforded by the court's orders of December 16 and January 25 [R. 225].

The cause proceeded to trial in rem against the "Proceeds" and in personam against the Bank, Kenray having withdrawn its answer and permitted its default to be entered. Following trial the district court held that Compania was entitled to assert its maritime lien against the "Proceeds" from the foreign letters of credit. In addition the court held that the Bank, by reason of its interest in the scrap metal and its instigation of, participation in and benefit from the shipment to Formosa (which was undertaken as a means to reduce Kenray's debts) would be unjustly enriched if Compania were not paid its hire [R. 225]. The Court of Appeals held *first* that Compania had waived its maritime lien, despite a contrary finding in the district court by permitting bills of lading to be issued which were marked "freight prepaid" and by permitting discharge of cargo at Formosa without requiring security for unpaid hire from the consignees (Appendix A, p. 5, *infra*); and *second* that, viewing the question of unjust enrichment as a matter controlled solely by California law, the interest of the Bank in the cargo of scrap metal, when coupled with its participation in planning the sale to Formosa and the benefits that derived from that sale, did not rise to the dignity of quasi-contract (Appendix A, p. 11, *infra*) whereupon the Court of Appeals reversed the judgment in Compania's favor.

REASONS FOR GRANTING THE WRIT.

1. By Deciding That Compania's Maritime Lien Was Either "Lost" or "Waived", the Ninth Circuit Goes Beyond Prior Decisions Establishing the Parameters of a Shipowner's Lien on Freights and Against the Line of Authority Defining the Nature of a Waiver of the Shipowner's Lien on Cargo.

Compania asserted a maritime lien against monies in the Bank's hands in two respects: First, so far as such monies represented the proceeds from sale of cargo; and second, so far as such monies represented freight monies.

The Ninth Circuit's determination that Compania waived its lien when it released the scrap cargo at Formosa necessarily places the judgment below in conflict with the dicta of this Court that a release of cargo after security has been arranged is not an unconditional release. In *THE BIRD OF PARADISE,* 72 U.S. (5 Wall.) 545 (1867), this Court said:

> ". . . where the payment or *security of payment* is to be concurrent or simultaneous with the delivery of the cargo the lien exists in full force. . . ."
> 72 U.S. at 556. (emphasis added).

The district court held that Compania's release of the SEARAVEN cargo was not unconditional (Appendix C, p. 17, *infra*) and made specific findings of nonwaiver [R. 225], citing *N.H. Shipping Corp. v. Freights of the S S JACKIE HAUSE,* 181 F. Supp. 165 (S.D. N.Y. 1960) in which the District Court for the Southern District of New York held that arrangements for security made prior to discharge defeated a claim that subsequent release of the vessel's cargo waived the shipowner's lien. In reversing, the Ninth Circuit either chose to disregard the trial court's findings on the issue

of waiver, in which event its decision is contrary to the holding of *McAllister v. United States,* 348 U.S. 19 (1954) (*see* p. 11, *infra*), or else it found that Compania waived its lien as a matter of law despite the rule in this and other courts to the contrary and despite the express finding of the trial court that there was no waiver. On either hypothesis, the conflict between the judgment below and the view of other courts facing the problem should be resolved.

So far as Compania's assertion of the lien against freight monies is concerned, the Ninth Circuit held that the lien was lost upon issuance of freight prepaid bills of lading. In so doing the court broke new ground by extending a rule heretofore used in this Court and elsewhere only for the protection of bona fide holders in due course of negotiable bills of lading. The district court found—and the Ninth Circuit apparently accepted it—that the Bank was not a bona fide purchaser for value. On the basis of its findings, the district court declined to apply the bona fide purchaser rule for the Bank's advantage. Its ruling is thus consistent with an older decision of the Southern District of New York in *THE SOLHAUG,* 2 F. Supp. 294 (S.D.N.Y. 1931) where the court had required double payment of hire. By overruling the district court, the Ninth Circuit has presented a question which this Court has not previously, but should, decide: should a rule developed to protect bona fide purchasers for value be extended to one who is found to be dealing in full knowledge that the carrier remains unpaid?

Because of the commercial significance of this question and the uncertainty which the decision below creates in a principle of law thought to be well settled, this Court should grant certiorari.

2. The Decision Below Raises Important Questions of the Power of a Court of Admiralty to Grant Equitable Relief as to Matters Within Its Subject Matter Jurisdiction and in Declining to Assume Such Powers Implicitly Conflicts With the Decisions of This Court and of Other Courts of Appeal.

The Ninth Circuit's opinion in this case treats Compania's constructive trust claim as falling within the district court's pendent jurisdiction only. In so doing the Ninth Circuit appears to limit this Court's decision in *Swift & Company Packers v. Compania Colombiana del Caribe, S.A.*, 339 U.S. 684 (1950), and to distinguish its own prior decision in *Putnam v. Lower*, 236 F. 2d 561 (9th Cir. 1956). The Ninth Circuit reads *Swift* as validating the equitable powers of an admiralty court only so far as necessary "to protect the court's admiralty jurisdiction". It distinguishes *Putnam* on the basis that the court there was dealing with questions of equitable defense. Since the equitable questions here were raised as part of Compania's claim rather than to preserve the jurisdiction of the court or by way of defense, the court below concludes that they constitute an "independent equitable claim" within the meaning of *Swift* and subject to determination in admiralty only where sound discretion warrants it as a matter of judicial economy. In so doing the court has unnecessarily restricted *Swift* to its own procedural setting and has limited the inherent powers of a court of admiralty in a way entirely at odds with the position of the Fifth Circuit as stated in *Compania Anonima*

Venezolana de Navegacione v. A. J. Perez Export Company, 303 F. 2d 692 (5th Cir. 1962):

> "The Chancellor is no longer fixed to the woolsack. He may stride the quarter-deck of maritime jurisprudence and, in the role of admiralty judge, dispense, as would his landlocked brother, that which equity and good conscience impels."
>
> 303 F. 2d at 699.

Moreover, the Ninth Circuit reading of *Swift* brings the judgment below into conflict with the decision of this Court in *Archawaski v. Hanioti,* 350 U.S. 532 (1956) (upholding an action for restitution) and the decision of the Second Circuit in *Sword Line, Inc. v. United States,* 228 F. 2d 344, (2d Cir. 1955) aff'd on reh. 230 F. 2d 75 (1956); aff'd 351 U.S. 976 (1956) (upholding admiralty jurisdiction an action in quasi-contract to recover overpayment of hire) and with such leading authorities as Gilmore & Black.

> ". . . [T]here is no warrant in history, venerable precedent, principle, or common sense for denying to the admiralty courts jurisdiction over the quasi-contractual claims. If the court is set up as the special industrial court of the shipping business, then obviously its expertness is just as much needed when the theory of action happens to be *quasi ex contractu* as at any other time."
>
> Gilmore & Black, *Admiralty* (1957) 26 n. 94.

The vice of the rule espoused by the Ninth Circuit is this: the court has unnecessarily intruded a choice of laws issue into the case and has concluded on the basis of California authority that the district court erred in

holding the Bank as constructive trustee despite the District Court's clear finding that the Bank would otherwise be unjustly enriched. It has thus denied to the district court the inherent powers judicially ascribed to a court of admiralty by the authorities cited above.

The limitations thus imposed upon the inherent powers of the district court so plainly conflict with the trend of decisional law in this Court and elsewhere as to justify the grant of certiorari.

3. On One Reading of Its Decision, the Ninth Circuit Has Improperly Assumed the Role of Trier of Fact.

As suggested above, one interpretation of the decision of the Ninth Circuit would lead to the conclusion that it ignored the findings of the trial court on the issues of waiver and unjust enrichment. Inasmuch as the Court of Appeals does not indicate any disagreement with the district court's view of the evidentiary facts, it follows that the Ninth Circuit has departed from the rule of *McAllister v. United States,* 348 U.S. 19 (1954), in which this Court held that an admiralty appeal was not a *trial de novo.* Had the Court of Appeals accepted the findings of the trial court at full value, it would not have reached the questions on which it bases its reversal of the district court's judgment. The Ninth Circuit, in reaching these questions, in essence retried the case without considering the viability of the findings of the district court, thereby exceeding its authority as defined by *McAllister.* This error alone justifies the grant of certiorari by this Court consider the judgment of the Court of Appeals.

4. This Court's Unique Power in Matters of Maritime Law Requires It to Resolve the Ambiguities Which the Judgment Below Has Created.

Maritime commerce has long been a field governed by custom and clear rules of priority. Because of the special powers in admiralty matters granted this Court by Article III, Section 2 of the United States Constitution and because of the overriding need for uniformity which the international character of such commerce imposes, this Court is in a unique position to clarify the rights made *unclear* by the Ninth Circuit in this case. The Ninth Circuit's decision is not easy to dissect, but once dissected it is seen to intrude both novelty and ambiguity into the rules by which maritime commerce is conducted. Only this Court can restore clarity. It should do so.

Conclusion.

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Dated: April 16, 1971.

Respectfully submitted,

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APPENDIX A.

Opinion of the Ninth Circuit Court of Appeals, January 20, 1971.

United States Court of Appeals for the Ninth Circuit.

Beverly Hills National Bank & Trust Co., *Appellant*, v. Compania de Navegacione Almirante S.A., Panama, *Appellee*. No. 22,694.

[January 20, 1971]

Appeal from the United States District Court for the Central District of California.

Before: BARNES, BROWNING, and KILKENNY, Circuit Judges BROWNING, Circuit Judge:

Invoking admiralty jurisdiction, Compania De Navegacione Almirante, owner of the S.S. Searaven, initiated this proceeding to recover charger hire due Compania under a charter party agreement with Kenray, Inc., an exporter of scrap metals, by enforcing a lien, or imposing a constructive trust, upon funds held by Beverly Hills National Bank & Trust Company. The district court awarded Compania $96,750 from the fund, the amount of the charter hire, plus interest. *Compania De Navegacione Almirante S.A. Panama v. Certain Proceeds of Cargo,* 288 F. Supp. 77 (C.D. Cal. 1967).[1] We reverse.

Kenray was heavily indebted to the bank, which held a security interest in certain scrap metal owned by Kenray. Kenray and the bank agreed that the scrap

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[1]The district court entered an in personam judgment against Kenray, which defaulted upon stipulation. The court denied Compania's claim for indemnification for stevedoring charges asserted against the Searaven in a separate proceeding; but Compania does not appeal.

would be sold in an overseas market to enable Kenray to reduce its debt to the bank. They agreed that Kenray would charter a vessel to carry the metal abroad and would purchase additional scrap with funds to be supplied by the bank in order to utilize the full capacity of the chartered ship. The bank financed the purchase of the additional scrap and provided a letter of credit to cover stevedoring service, but asked Kenray to procure a vessel without a letter of credit from the bank for charter hire.

Kenray chartered the Searaven from Compania to carry the scrap metal to discharging ports in Japan or Formosa. The charter agreement provided for charter hire of $96,750, 90 per cent to be paid within seven days after delivery of signed bills of lading marked "Freight Prepaid as Per Charter Party"; the balance payable after discharge of the cargo. The bank was not party to the charter party agreement, and did not issue a letter of credit for charter hire.

Kenray contracted to sell the scrap to several Formosa firms, payment to be by foreign letters of credit in favor of Kenray to be drawn against upon presentation of freight prepaid bills of lading.

Kenray's scrap,[2] plus a quantity owned by Purdy International Corporation, was loaded aboard the Searaven, and Compania's agent issued "Freight Prepaid" bills of lading to Kenray. Kenray delivered bills of lading representing Kenray's portion of the cargo (about 90 per cent) to the bank, together with drafts in favor of the bank on the foreign letters of credit furnished by the consignees. The bank collected the drafts and asserted a banker's lien against the proceeds. The

[2]The bank held legal title to all of Kenray's scrap as security.

bank also asserted a banker's lien against Kenray's commercial account containing the freight paid to Kenray by Purdy for carriage of Purdy's scrap on the Searaven.

While the Searaven was en route to Formosa, Compania instituted the present proceeding as a libel in rem and in personam for charter hire against "the proceeds of cargo, freights and subfreights of the S.S. Searaven," and against Kenray and the bank. Compania asserted that it had a maritime lien on the cargo for charter hire and that this lien attached to the proceeds of the letters of credit collected by the bank. The district court ordered a portion of the fund sufficient to satisfy the charter hire brought into court under former General Admiralty Rule 37, now Supplemental Rule C(a) of the Federal Rules of Civil Procedure.

When the Searaven arrived in Formosa, the captain, acting for Compania, declined to relinquish possession of the cargo until the consignees guaranteed payment of both charter hire and the cost of repairs made in Hawaii en route to Formosa. The captain discharged the cargo on Compania's instruction, however, after the consignees posted bond for the cost of repairs.

Absent an inconsistent agreement, the vessel owner has a lien on cargo for freight. *Osaka Shosen Kaisha v. Lumber Co.*, 260 U.S. 490, 497 (1923); *The Bird of Paradise*, 72 U.S. (5 Wall.) 545, 555 (1866); *The Eddy*, 72 U.S. (5 Wall.) 481 (1866); *The Saturnus*, 250 F. 407, 409-10 (2d Cir. 1918); Gilmore & Black, The Law of Admiralty §3-45, at 165 (1957).

Like a land carrier's common-law possessory lien, and unlike the ordinary maritime lien, the vessel own-

er's lien on cargo for freight continues only so long as the cargo remains in the owner's actual or constructive possession. It is extinguished by unconditional delivery of the goods. *The Maggie Hammond,* 76 U.S. (9 Wall.) 435, 449-50 (1869) (dictum); *The Bird of Paradise, supra,* 72 U.S. at 556; *4,885 Bags of Linseed,* 66 U.S. (1 Black) 108, 112-13 (1861); *Gilmore & Black, supra,* at 165-66. *See also Krauss Bros. Co. v. Dimon S.S. Corp.,* 290 U.S. 117, 125-26 n. 3 (1933).

The district court held that release of the cargo to the Formosan consignees did not extinguish the cargo lien because Compania, prior to release, attached funds representing the "proceeds" of the cargo. The court rested its ruling entirely upon *N.H. Shipping Corp. v. Freights of the S/S Jackie Hause,* 181 F. Supp. 165, 170 (S.D.N.Y. 1960).

In *Jackie Hause,* the owner discharged the cargo only after the shipper-consignee agreed to deposit in escrow, to await determination of ownership, the amount due as unpaid freight. The court held that delivery of the cargo on this condition "did not effect that absolute and unconditional change of possession to the consignee sufficient to extinguish the vessel's lien for payment of its charter hire." *Id.* at 171.

In the present case, Compania conditioned discharge upon the posting of security for payment of costs of repair;[3] but so far as charter hire was concerned, Compania released the cargo unconditionally. Under

[3]A lien against cargo for general average for repairs made en route is also a possessory lien. *See* DuPont de Nemours & Co. v. Vance, 60 U.S. (19 How.) 162, 171 (1856); Culter v. Rae, 48 U.S. (7 How.) 728, 731 (1849); Wellman v. Morse, 76 F. 573, 575 (1st Cir. 1896).

the authorities cited above, Compania thereby relinquished its lien on cargo for freight.

Compania seeks to sustain the judgment on a second theory, namely, that under the charter party it had a nonpossessory lien on the freights and subfreights earned by the cargo, and that the attached funds included such freights.

A lien on freights is lost, however, if the charges are paid without notice of the shipowner's rights. *See Marine Traders, Inc. v. Seasons Navigation Corp.*, 422 F.2d 804, 806-07 (2d Cir. 1970); *Hall Corp. v. Cargo Ex Steamer Mont Louis, Etc.*, 62 F.2d 603, 605 (2d Cir. 1933) (dictum); *In re North Atlantic & Gulf Steamship Co.*, 204 F. Supp. 899, 904 (S.D.N.Y. 1962), *aff'd sub nom Schilling v. A/S D/S Dannebrog*, 320 F.2d 628 (2d Cir. 1963); Gilmore & Black, *supra* §4-17, at 208 n.129 and cases there cited; Stephens, Freight 200 (1907).[4] The lien cannot arise where, as here, the freights are prepaid. *See* Poore, Charter Parties and Ocean Bills of Lading, § 16 at 48 (1968 ed.)

Finally, Compania argues that the district court properly concluded that, to the extent of the unpaid charter hire, the bank held the funds as constructive trustee for the benefit of Compania.

The bank challenges the district court's jurisdiction to entertain a claim for relief on this ground.

As the bank concedes, the district court had jurisdiction in admiralty to adjudicate Compania's claim of a maritime lien upon the money held by the bank.[5] The

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[4]The freights were uncollected when the lien was asserted in *Jackie Hause, supra*, 181 F.Supp. at 167, 169.

[5]It is immaterial to admiralty jurisdiction that the claim of lien ultimately failed. "[T]he question of lien or no lien is not one of

(This footnote is continued on the next page)

district court regarded the constructive trust claim as raising only "subsidiary" or "derivative" equitable issues "incidental" to Compania's admiralty claim and held that the claim of constructive trust was therefore within the courts admiralty jurisdiction under the doctrine of *Swift & Co. Packers v. Compania Columbiana Del Caribe, S.A.*, 339 U.S. 684, 689-95 (1950).

Swift makes clear that admiralty jursidiction does not extend to an "independent equitable claim" as distinguished from an "incidental" one. *See Swift, supra,* at 690.

Compania apparently argues that equitable issues are "incidental" rather than "independent" whenever advanced in litigation in which the court's jurisdiction has been properly invoked. Compania points to the statement in *Putnam v. Lower,* 236 F. 2d 561, 569 (9th Cir. 1956), that "where the original jurisdiction is maritime, a court of admiralty may entertain an issue of fraud, mistake, or other equitable claim where either is alleged as affecting the rights of parties to a maritime action" (236 F.2d at 569 (footnote omitted)); *see also CIA Estrella Blanca, LTDA v. S.S. Nictric,* 247 F. Supp. 161, 171 (D. Ore. 1965), *aff'd* 368 F.2d 575 (9th Cir. 1966).

In *Putnam,* however, the equitable issues arose in an admiralty action by way of defense. In *Swift* it was necessary to decide the equitable issues to protect the court's admiralty jurisdiction "from being thwarted by a fraudulent transfer." 339 U.S. at 694.[6]

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jurisdiction, but of merits." The Resolute, 168 U.S. 437, 440 (1897).

[6]In Archawski v. Hanioti, 350 U.S. 532, 536 (1956), the claim of unjust enrichment "rose as the result of the breach of

Compania's constructive trust claim was not presented by way of defense, and it was unnecessary to resolve it to enable the court to exercise jurisdiction over Compania's admiralty lien claim. Nor was resolution of the equitable issues necessary to afford an adequate remedy on the admiralty claim. If Compania had an admiralty lien on the fund, an effective judgment could have been rendered in Compania's favor whether or not the bank held the money as constructive trustee.

Thus, Compania's constructive trust claim constituted a separate basis for recovery, legally unrelated to Compania's maritime lien claim; and we are inclined to the view that it was therefore an independent equitable claim beyond the admiralty jurisdiction. *Swift, supra,* at 690-91; *The Eclipse,* 135 U.S. 599, 608 (1890).

The district court did, however, have jurisdiction over Compania's equitable claim on two other grounds.

The district court had "pendent" jurisdiction over the claim. In *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966), the Supreme Court held that "pendent" jurisdiction exists when there is a federal claim.

> "and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' The Federal claim must have substance sufficient to confer subject matter jurisdiction on the court. The state and federal claims

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a maritime contract." *Accord,* Sword Line Inc. v. United States, 351 U.S. 976 (1956). Kossick v. United Fruit Co., 365 U.S. 731, 738 (1961), involved breach of an agreement to compensate a seaman's "forbearance to press . . . the full extent of his maritime right to maintenance and care." The Court's statement in Vaughan v. Atkinson, 369 U.S. 527, 530-31 (1962), referred to the power of an admiralty court to grant equitable relief upon a claim itself within admiralty jurisdiction.

> must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole." 383 U.S. at 725 (citation and footnote omitted) (emphasis in original).[7]

Here, the only question was who was entitled to the fund. Compania advanced two theories to support its claim. One was that it had a maritime lien on the fund—a theory raising issues within the district court's admiralty jurisdiction, as the bank concedes. Compania's second theory was that the bank held the fund as constructive trustee for Compania's benefit. Compania's suit thus joined alternative theories of recovery, one within and one outside federal jurisdiction. Because both arose from "a common nucleus of operative fact" —involving the same parties, the same transactions, the same res, the same amount claimed due—and because Compania would ordinarily be expected to try both in one judicial proceeding, the district court had power, under *Gibbs*, to exercise pendent jurisdiction over the equitable claim.[8]

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[7]*Gibbs* involved federal question jurisdiction but there is no reason why the doctrine of pendent jurisdiction should not be equally applicable when jurisdiction over the federal claim is in admiralty. 1A Moore's Federal Practice 3146-47. *Cf.* Romero v. International Terminal Operating Co., 358 U.S. 354, 380-81 (1959).

[8]It is immaterial to pendent jurisdiction that the federal claim ultimately failed on the merits. *Gibbs, supra,* 383 U.S. at 728; Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 249 (1951); Bell v. Hood, 327 U.S. 678 (1946); Geneva Furniture Mfg. Co. v. S. Karpen & Bros., 238 U.S. 254, 258-59 (1915).

Gibbs made clear, of course, that "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants. . . ." 383 U.S. at 726 (footnote omitted). But in this case there were good reasons for the federal court to hear the equitable claim. Compania's federal claim could only be asserted in a kind of in rem proceeding exclusively cognizable in a federal district court exercising admiralty jurisdiction. *Madruga v. Superior Court,* 346 U.S. 556, 560 (1954). In consequence, Compania could submit both claims to the fund only to a federal court. Sound discretion precluded fractionating a dispute over the single res simply because Compania pressed two theories of recovery. *Cf. Fitzgerald v. United States Lines Co.,* 374 U.S. 16, 21 (1963). Such a course would have resulted in unnecessary and duplicative litigation, a waste of judicial and private resources, needless delay, and the creation of difficult problems of laches, statutes of limitation, and collateral estoppel.

The district court also had jurisdiction on the second, independent, ground that diversity jurisdiction under 28 U.S.C. § 1332 was established on the record. Compania was a citizen of Panama, the bank a citizen of California, and the amount on controversy exceeded $10,000.

It is immaterial that the district court purported to exercise admiralty rather than pendent or diversity jurisdiction. *Troupe v. Chicago, D. & G. Bay Transit Co.,* 234 F.2d 253, 258 (2d Cir. 1956); *Moran Towing & Transp. Co. v. Navigazione Libera Triestina, S.A.,* 92 F.2d 37, 39 (2d Cir. 1937); *Prince Line v. American Paper Exports,* 55 F.2d 1053, 1056 (2d Cir. 1932). There was no right to a jury trial since the

constructive trust claim was equitable, *Black v. Boyd,* 248 F.2d 156, 162 (6th Cir. 1957); and even if such a right existed the bank could not complain for it did not demand a jury. *See United States v. The John R. Williams,* 144 F.2d 451, 454 (2d Cir. 1944); *Prince Line, supra; cf. The Confiscation Cases,* 87 U.S. 92, 109-10 (1873); *United States ex rel. Pressprich & Son Co. v. James W. Elwell & Co.,* 250 F. 939, 942 (2d Cir. 1918). There is no choice of law problem. Both parties assume that California substantive law governs the constructive trust claim, or at least the state law simply follows general equitable principles.[9]

Turning to the merits, we agree with appellant that the district court's findings do not support imposition of a constructive trust for Compania's benefit.

There is no finding that the bank received or retained the funds by fraud, actual or constructive. There is no finding that a confidential relationship existed between the bank and either Kenray or Compania. There is no finding that the bank misrepresented to Kenray or to Compania that the bank would pay Compania, or permit Kenray to do so, from the proceeds of the letters of credit. The drafts and letters of credit were not delivered to the bank by Kenray through mistake or as the result of undue influence, but deliberately and voluntarily. There is no finding that the bank was

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[9]The pertinent California rule is codified in Cal. Civ. Code § 2224, which "is merely an affirmation of the principle applied in equity in the absence of any statutory provision." V Scott on Trusts p. 3429 (3d ed. 1967). Section 2224 reads:

> "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

unjustly enriched by receipt of the proceeds—they were applied to the reduction of Kenray's pre-existing debt to the bank, and left Kenray obligated to the bank for over $200,000.

The district court concluded that Kenray received the Purdy subfreights and the proceeds of the letters of credit as constructive trustee for the benefit of Compania. If this were so, Compania could follow the fund into the bank's hands, for the district court also found that the bank was not a good faith purchaser. R.S. Restitution § 160, comment g, p. 647; V Scott on Trusts, p. 3571 (3d ed. 1967). But there is nothing in the findings that would justify treating Kenray as any more than a debtor of Compania, and mere failure to pay a debt does not create a constructive trust upon the debtors' property for the creditor's benefit. *See McKee v. Paradise,* 299 U.S. 119, 122 (1936); *Woodruff v. Coleman,* 98 A.2d 22 (D.C. Mun. Ct. of App. 1953).[10]

The district court also concluded that the bank held the funds as constructive trustee for Compania. The substance of the district court findings is that both the bank and Compania were creditors of Kenray, and the bank secured payment out of funds that Kenray otherwise might have used to pay Compania. It does not follow that the creditor who was paid holds the payment as constructive trustee for the benefit of the creditor who was not. *See Zirker v. Baber,* 161 Cal. App. 2d 355 (4th D.C.A. 1958).

Reversed.

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[10]The district court found that "Kenray reasonably anticipated that proceeds from the sale of the scrap would be used in part to pay said charter hire." But a debtor's "mere expectation or hope" that the debt will be paid from a particular source is not sufficient to raise a trust for the creditor's benefit. 1 Bogert, Trusts & Trustees § 19, p. 129 (2d ed. 1965).

APPENDIX B.

Order Denying Rehearing, Ninth Circuit Court of Appeals, February 11, 1971.

United States Court of Appeals for the Ninth Circuit.

Beverly Hills National Bank & Trust Co., Appellant, v. Compania de Navegacione Almirante S.A., Panama, Appellee. No. 22,694.

ORDER

Before: BARNES, BROWNING and KILKENNY, Circuit Judges.

The opinion filed January 20, 1971, is modified by substituting the following for lines 11-13, page 4 of the slipsheet opinion:

> "Freight 200 (1907); Poor, Charter Parties and Ocean Bills of Lading, § 16 at 51 (1968 ed.).[4]"

Appellee's petition for rehearing is denied.

Dated: February 11, 1971.

APPENDIX C.

Opinion of the United States District Court, Central District of California, December 15, 1967.

Compania De Navegacione Almirante S. A. Panama, Libelant, v. Certain Proceeds of Cargo, etc., of the vessel S. S. SEARAVEN; Kenray, Inc., a corporation; and Beverly Hills National Bank & Trust Company, a national banking associtions, Respondents. No. 64-1750.

United States District Court, C. D. California. Dec. 15, 1967.

OPINION

WHELAN, District Judge.

In this action Libelant, a Panamanian corporation and owner of the vessel S.S. SEARAVEN, by its complaint seeks to libel the proceeds of cargo, freights and subfreights of the S.S. SEARAVEN. Kenray, Inc., a corporation, one of the Respondents whose default has been entered herein, was charterer of the SEARAVEN under a voyage party entered into with Libelant on September 30, 1964; the charter party in a standard Gencon form let the SEARAVEN to Kenray for a voyage from one or two safe California ports to one or two discharging ports in Japan or Formosa. Under the terms of the charter party the charter hire, which remains unpaid, was in the sum of $96,750.00. The charter party called for payment of 90% of the charter hire within seven days after delivery of signed bills of lading, signed by the owner and delivered to Kenray.

Under the terms of the charter party Libelant has an express lien upon cargo for freight.

The vessel was delivered to Kenray and thereupon was loaded with approximately 10,000 tons of scrap and thereafter proceeded to Taiwan, Formosa.

For some time prior to the charter of the SEARAVEN, Kenray and Respondent Beverly Hills National Bank & Trust Company, hereinafter "Bank," had been discussing means whereby the large indebtedness of Kenray to the Bank could be fully or at least largely satisfied. An investigation was made to determine where the scrap then in Kenray's hands could bes. be marketed and it was decided that Japan or Formosa provided the most advantageous market. Thereupon the question of the charter of a ship for carriage of scrap occurred and it was determined that additional scrap should be purchased with funds to be supplied by the Bank to fully utilize the capacity of a charter ship of the type being considered. The Bank agreed to and did give Kenray also a bill of credit to cover the cost of stevedore services for the loading of cargo on the SEARAVEN. Kenray, during the course of these discussions, indicated that it could probably procure a ship from Libelant without the issuance of a bill of credit by the Bank for charter hire in view of past favorable business relationships between Kenray and Libelant concerning charter hire, and the Bank requested that Kenray attempt such course in order that the Bank's financial position would not be further affected by the issuance of a letter of credit for charter hire. Thereafter the charter party was entered into between Libelant and Kenray without any letter of credit being issued to Libelant for charter hire.

During October and early November 1964, Libelant's duly authorized agent executed and delivered to Kenray bills of lading covering all of the cargo. Kenray

was named as shipper in all bills of lading other than one in which Purdy International Corporation is named as shipper of 999.86 tons of scrap. Kenray delivered all of its said bills of lading to the Bank and drew and delivered to the Bank drafts on all the foreign letters of credit furnished by consignees of the cargo of which Kenray was designated shipper, in favor of Respondent Bank; prior to the commencement of this action and in late November 1964, Respondent Bank collected all of the drafts drawn by Kenray in the total amount of $535,371.21. At the time that Kenray delivered the bills of lading and drafts to the bank, Kenray was indebted to the Bank in the sum of approximately $742,203.81, and legal title to the scrap on the SEARAVEN, other than the scrap owned by Purdy Intenational Corporation, was in the name of the Bank to secure monies owed to it by Kenray.[1]

When the proceeds of the drafts were received by the Bank, the Bank then asserted its banker's lien against all of such proceeds. The Bank, on December 2, 1964, also asserted its banker's lien against the commercial account of Kenray in said Bank for the sum of $16,-387.46; in such commercial account at that time was subfreight paid by Purdy International Corporation to Kenray in the sum of $9,998.60, such subfreight being for the carriage of Purdy's cargo on the SEARAVEN.

It was not until after Kenray had delivered to the Bank all of the bills of lading, together with the drafts

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[1]Part of the cargo actually was purchased in 1964 with monies then advanced by the Bank for the purpose of utilizing the complete capacity of the ship which was to be chartered by Kenray for the purpose of shipping the cargo already owned by Kenray subject to the security rights of the Bank. By such additional purchase the obligation to pay dead freight on any unused capacity of the ship would be avoided.

for collection, that the Bank representative stated that "Kenray will pay for the freight"; however, no representative of the Bank told Kenray that the Bank would not permit the proceeds of the foreign letters of credit to be used to pay for the ocean freight.

Before the delivery of any of the cargo of the SEA-RAVEN to any of the consignees Libelant filed its libel, and prior to such delivery of any of the cargo the Court, upon Libelant's motion, ordered that proceeds of cargo, freights and subfreights be brought into Court to answer the libel. Thereupon and also before the delivery of any of the cargo, the parties stipulated that the amount to be deposited pursuant to Court's order was in the principal sum of $145,000.00 without prejudice to the right of the Bank to contend that in fact the order of Court ordering the deposit of proceeds of cargo, freights and subfreights was improper.

THE JURISDICTION OF THE COURT

This Court had jurisdiction to require Respondent Bank to deposit the funds ordered deposited to the extent necessary to satisfy charter hire. The freight earned by the cargo represents the sum to be paid for the use of the ship and a lien on cargo when the vessel has not been paid its hire is a lien on the sum earned by the cargo. N. H. Shipping Corp. v. Freights of the S/S Jackie Hause, 181 F.Supp. 165, 170 (S.D.N.Y. 1960); Jebsen v. A Cargo of Hemp, 228 F. 143 (D.C. Mass. 1915).

Where freights have been collected by the charterer and the freights are within the territorial jurisdiction of the Court, the Court has jurisdiction in rem over such freights. Lathrop v. Freights of the John Ena, 212 F. 560 (N.D. Cal. 1914).

Wherever a lien exists and attaches upon proceeds, an Admiralty Court may exert its jurisdiction over such proceeds by way of monition addressed to the party holding them. See Sheppard v. Taylor, 5 Peters 675, 8 L. Ed. 269 (1831).

THE SHIPOWNER'S LIEN WAS NOT EXTINGUISHED

Respondent Bank contends that Libelant shipowner lost its lien on cargo by failing to libel the cargo for charter hire prior to delivery of the cargo to the consignees. This Court considers such contention without merit. Here Libelant attached the proceeds or freight earned by the cargo in the hands of Respondent Bank while the cargo was still in the possession of the ship. It would seem that the rule announced in N. H. Shipping Corp. v. Freights of the S/S Jackie Hause, supra, 181 F.Supp. at p. 171 of the opinion, is here applicable. In the *Freights of the S/S Jackie Hause* the Court stated: "Nor was the delivery of the cargo to Ministerio at the port of discharge a relinquishment of the owner's lien on the cargo. While N. H. Shipping Corp.'s lien was dependent on possession of the cargo and it had the right to pursue the cargo in payment, it could substitute the freights for the cargo and pursue them. It was only on condition that the freights be substituted for the cargo that N. H. Shipping Corp. released it. * * * To say that the 'Jackie Hause' had no choice but to sit in a foreign port with the cargo in its hold or in a warehouse at its risk in order to protect its lien disregards law and commonsense. The delivery of the cargo by N. H. Shipping Corp. did not effect that absolute and unconditional change of possession to the consignee sufficient to extinguish the vessel's lien for

payment of its charter hire. United States v. Freights of Mt. Shasta, 274 U.S. 466, 47 S.Ct. 666, 71 L.Ed. 1156; The Bird of Paradise, supra, [5 Wall. 545, 72 U.S. 545, 18 L.Ed. 662;] The Volunteer, C.C. Mass. 1834, Fed. Cas. No. 16,991; McBrier v. A Cargo of Hard Coal, D.C., 69 F. 469; Bank of British North America v. The Freights, etc. of the Hutton, 2 Cir., 137 F. 534."

THE COURT MAY FIX A REASONABLE FREIGHT WHERE THE CHARTERER OWNS THE CARGO

As against the contention of Respondent Bank that there is no ascertainable freight in this case inasmuch as the charterer Kenray owned all but a small portion of the cargo, the Court can fix a reasonable charge for freight for all of the cargo here and carve such freight out of the proceeds of cargo. Whitney v. Tibbol, 93 F. 686, 688 (9th Cir. 1899). In this matter the parties agreed upon a charter hire for the SEARAVEN. The Court considers the amount of such charter hire as evidence of the reasonable freight to be here carved out by the Court; in addition, it is known what Purdy International Corporation, the owner of approximately 10% of the whole cargo, paid to Kenray as freight for the carriage of Purdy's cargo; the rate per ton paid by Purdy is evidence of the reasonable rate per ton for the carriage of Kenray's cargo; and the rate per ton charged Purdy would, when applied to the entire cargo, produce for the freight for the entire cargo of the SEARAVEN an amount greater than the amount fixed as charter hire by Libelant and Kenray. The Court fixes the reasonable freight for the carriage of the whole cargo in the sum of $96,750.00, the amount of the charter hire agreed upon.

LIBELANT IS NOT ESTOPPED TO ASSERT LIEN

The fact as contended by the Bank that Libelant could not have asserted its lien for charter hire on the cargo as against the consignees of the cargo because of the payment in advance without notice of Libelant's rights by the consignees for the cargo including prepaid freight charges, is not a defense here for the Bank. A shipowner has a maritime lien for charter hire on cargo where the lien is, as here, reserved initially in the original charter and incorporated into the bills of lading, against all others than good faith purchasers of the cargo who have paid for it in advance without notice of the shipowner's rights. See Toro etc. Corporation v. Bacon etc. Company, 364 F.2d 928, 930 (5th Cir. 1966).

EQUITABLE RELIEF IS HERE PROPER

Here Libelant's claim that it would be grossly inequitable if the Bank could avoid the payment of charter hire, i.e. reasonable freight, is sound. The whole purpose of the charter was to secure money to reduce, if not to extinguish, Kenray's debt to the Bank. The Bank and Kenray discussed the procurement of the chartered vessel and the Bank provided additional money to buy more scrap to fill out the cargo capacity of the SEARAVEN, thus to avoid obligation for dead freight. The Bank was familiar with the bad financial position of Kenray and had discussed with Kenray methods of repairing such condition. The amount of money owed by Kenray to the Bank was a very large sum from the Bank's standpoint and the Bank encouraged Kenray to secure the charter of the SEARAVEN without the issuance of a letter of credit by the Bank so that the

Bank's financial position with respect to Kenray might appear in a better light to anyone examining such financial relationship. It was only after the Bank had all of the signed bills of lading with drafts for collection of the amounts due thereon that its representative suggested to Kenray that Kenray take care of paying for the charter hire itself.

While a Court of Admiralty will not encourage an independent equitable claim merely because it pertains to maritime property, an Admiralty Court that has secured jurisdiction as an admiralty Court may then proceed in the trial of the cause on equitable principles. Putnam v. Lower, 236 F.2d 561, 568 (9th Cir. 1956). See Swift & Co. v. Compania Colombiana Del Caribe, 339 U.S. 684, 691, 70 S.Ct. 861, 94 L.Ed. 1206. In the instant action, the Court sitting in Admiralty has jurisdiction concerning the validity of Libelant's lien for freight and its right to recover the charter hire under the charter party. The Court here had jurisdiction to attach the proceeds of the cargo, i.e. freight earned by the cargo, under the circumstances here present. As the Supreme Court in Swift & Co. v. Compania Colombiana Del Caribe, supra, at p. 691, 70 S.Ct. 861, ruled, an Admiralty Court can, as a means of effectuating a claim incontestably in Admiralty, determine subsidiary or derivative equitable issues.[2]

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[2]In Swift & Co. v. Compania Colombiana Del Caribe, supra, an issue of fraud arose in connection with an attachment in Admiralty on a claim arising upon a contract of an affreightment supplemented by charges of negligence in a non-delivery of a sea cargo —matters in the words of the Supreme Court "obviously within Admiralty jurisdiction." Libelants, as an incident to the claim in order to secure respondent's appearance and to insure the fruits of a decree, made the attachment. The jurisdiction of the Court to determine the fraud issue upheld. In the case at bar, Respondent Bank is in practical effect the beneficiary of the charter

To stay the hands of Admiralty "as to a matter intrinsically nonmaritime but 'necessary to the complete adjustment of rights over which admiralty has independent jurisdiction'" would seriously impair the discharge by Admiralty of the task which belongs to it. Swift & Co. v. Compania Colombiana Del Caribe, *supra*, at p. 693, 70 S.Ct. at p. 867.

LIBELANT'S CLAIM FOR INDEMNITY

In addition to asserting a lien for the amount fixed as charter hire, Libelant here seeks also to recover any amount for which it may become obligated to Metropolitan Stevedore Co. for stevedoring work in the loading of the SEARAVEN prior to its departure for Formosa. The charter party does not give any lien to Respondent to cover such liability if any exists. In addition, Metropolitan Stevedore Co. did not look to the ship for compensation for its services; rather it demanded a letter of credit from Kenray and Kenray furnished the same.[3]

Counsel for Libelant are directed to prepare proposed findings of fact and conclusions of law and judgment consistent with the Court's decision herewith, and to serve and file the same. No judgment is to be entered until the Court signs the formal written judgment.

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party between Kenray and Libelant, and the charter of the Searaven was effected only through the active financial assistance of the Bank. As before stated, a substantial portion of the cargo was purchased with money supplied by the Bank for the purpose of filling out the cargo for the charter in question.

[3]Metropolitan Stevedore Co. failed to timely assert its rights under the terms of the letter of credit and it thereafter filed a libel against the Searaven for compensation for stevedoring services when the Searaven was in Honolulu en route to Formosa. The Hawaiian action has as yet not been disposed of.

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
MAY 4 1971
ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970
No. 1600

COMPANIA DE NAVEGACIONE ALMIRANTE S.A., PANAMA, a Panamanian corporation,

Petitioner,

vs.

BEVERLY HILLS NATIONAL BANK, a National Banking Association,

Respondent.

Brief of Respondent in Opposition to Petition for a Writ of Certiorari

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Respondent.

Brief of Respondent in Opposition to Petition for a Writ of Certiorari.

Opinions Below.

The opinion of the Court of Appeals for the Ninth Circuit, as modified on denial of rehearing, (Petition, Appendices A and B) is reported at 437 F. 2d 301. The opinion of the District Court (Petition, Appendix C) is reported at 288 F. Supp. 77.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Restatement of the Questions Presented.

1. Is a shipowner's possessory lien upon cargo for unpaid charter hire lost upon surrender of the cargo?

2. Assuming that a shipowner has a non-possessory lien upon freights earned by a vessel under charter, is that lien lost if the freights are prepaid prior to appropriate assertion of the lien?

3. Can one of two creditors of a common debtor assert a constructive trust upon funds paid to the other creditor in the absence of findings of fraud, undue influence, unjust enrichment or any other of the grounds historically required for the granting of equitable relief?

Supplement to Statement of the Case.

Both Petitioner and Respondent Beverly Hills National Bank are creditors of a common debtor, Kenray, Inc. Petitioner's claim is for unpaid charter hire, while Respondent's is for monies loaned. The issues were whether Petitioner could assert a maritime lien upon certain funds paid by Kenray to Respondent and applied on the debt admittedly owed to Respondent, and whether in the absence of a maritime lien, Petitioner could assert an equitable claim based upon a theory of constructive trust.

The Court of Appeals rejected both of Petitioner's theories. On the issues of maritime lien the Court held —in accordance with numerous prior decisions—that the shipowner's possessory lien on cargo had been lost by surrender of the cargo and that any maritime lien on freights had failed by payment of the freights prior to assertion of the lien. Contrary to Petitioner's arguments (Petition, pp. 7-8) the holding of the Court of Appeals on the maritime issues was neither novel nor did it extend a rule theretofore limited to holders of negotiable bills of lading.

On the issue of constructive trust, Respondent Bank argued below that the Court, sitting in admiralty, had no jurisdiction to consider what was purely an equitable claim. The Court of Appeals rejected Respondent's jurisdictional argument and ruled—in Petitioner's favor—that while there was no admiralty jurisdiction to consider an independent equitable claim, the constructive trust claim could be asserted and considered upon either a theory of "pendent" or diversity jurisdiction.[1] The Court of Appeals then went to the merits of Petitioner's constructive trust claim and concluded —based upon hornbook equity law—that the findings of fact made by the trial court did not sustain the imposition of a constructive trust. In so holding the Court of Appeals did not—as Petitioner asserts (Petition, p. 11)—reweigh factual determinations; rather the Court of Appeals exercised customary appellate standards in determining whether the trial court's findings sustained the legal conclusion which it reached.

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[1]On the application of pendent jurisdiction the Court of Appeals relied upon the decision of this Court in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

ARGUMENT.

The issues in the present case are indeed narrow and episodic. They relate entirely to the efforts of two creditors to obtain payment from a common insolvent debtor. Despite ingenious—but nevertheless distorted—arguments by Petitioner, the decision of the Court of Appeals is not in conflict with other decisions of this Court or other Courts of Appeals nor is it of such significance to warrant review by this Court on certiorari.

I.

In Rejecting the Asserted Maritime Lien the Court of Appeals Applied Established Principles of Admiralty Law.

A. A Shipowner's Lien Upon Cargo Is Possessory in Nature. It Is Lost Upon Surrender of the Cargo.

A shipowner has a possessory lien upon cargo which —unless waived—entitles him to retain the cargo until the freight due has been paid. The lien, being possessory in nature, is lost upon unconditional surrender of the cargo [*e.g., 4885 Bags of Linseed,* 66 U.S. 108, 113 (1861); *The Bird of Paradise,* 72 U.S. 545, 555-556 (1886); *Cutler v. Rae,* 48 U.S. 374, 376 (1848); Gilmore & Black, *The Law of Admiralty,* (1957) pp. 165-66].

Petitioner's assertion, (Petition, p. 7) that the Court of Appeals' decision conflicts with the decision in *The Bird of Paradise, supra,* 72 U.S. 545, cannot be sustained. *The Bird of Pardise* confirms the accepted rule—recognized here by the Court of Appeals—that the shipowner's lien on cargo is possessory in nature and is lost upon unconditional surrender of the cargo.[2]

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[2]This Court said: "Although the lien is maritime and cognizable in the admiralty, yet it stands upon the same ground with

In *The Bird of Paradise* the shipowner had not made an unconditional surrender of the cargo and had asserted a lien upon the cargo for unpaid charter hire. The issue there was whether the shipowner's lien had been waived by accepting credit arrangements for the payment of the charter hire. This Court held that there had been a partial waiver and that no lien on cargo could be asserted for that portion of the freight charges which were not payable until a date following discharge.

Petitioner argues that a release of cargo after security had been arranged is not an unconditional release so as to discharge the shipowner's lien. But such security arrangements must be consensual [See: *N. H. Shipping Corp. v. Freights of the S.S. Jackie Hause,* 181 F. Supp. 165, 171 (S.D.N.Y. 1960)] and no such consensual arrangements were made here.[3]

B. Any Lien on Freights Was Discharged by Payment of the Freights Prior to Assertion of the Lien.

Petitioner argued below that it had a non-possessory lien upon the freights and sub-freights earned by the cargo and that the attached funds included such freights. Those funds, however, had been paid to Re-

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the lien of the carrier on land, and arises from the right of the ship-owner to retain the possession of the goods until the freight is paid, and is lost by an unconditional delivery to the consignee." (72 U.S. at 555).

[3]The record is undisputed that no security was posted for charter hire as it was for general average. Petitioner argued below that the levying of an attachment on Respondent under former General Admiralty Rule 37 (now Supplemental Rule C(3) of the Federal Rules of Civil Procedure) was the equivalent of a consensual posting of security. The argument is specious. A unilateral attachment is not the equivalent of a bilateral posting of security in lieu of cargo. If an attachment were equivalent to the posting of security, the whole concept of *possessory* liens and the necessity for retaining possession could be avoided by the unilateral exercise of a provisional remedy.

spondent prior to the assertion of any lien and the Court of Appeals properly concluded that the lien had been discharged, in accordance with numerous authorities that a shipowner's lien on freights is lost if the funds are paid prior to assertion of the lien [*Marine Traders Inc. v. Seasons Navigation Corp.*, 422 F. 2d 804, 806-07 (2d Cir. 1970); *Oceanic Trading Corp. v. Freights, Sub-Freights and Demurrage of the Vessel Diana*, 423 F. 2d 1, 5-6 (2d Cir. 1970); *Ariate Compania Naviera v. Commonwealth Tankship Owners, Ltd.*, 310 F. Supp. 416, 422 (S.D.N.Y. 1970); *In re North Atlantic & Gulf Steamship Co.*, 204 F. Supp. 899, 904 (S.D.N.Y. 1962), *Aff'd Sub Nom Schilling v. A/S D/S Dannebrog*, 320 F. 2d 628 (2d Cir. 1963); Gilmore & Black, *Op. Cit.* p. 208, note 129 and cases collected; Stephens, *Freight*, p. 200 (1907); Poor, *Charter Parties and Ocean Bills of Lading* (1968 ed.), § 16 at p. 51].[4]

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[4]Since the Court of Appeals decided that any lien that Petitioner may have had on freights had been discharged by prepayment of the freights, the Court was nor required to decide whether Petitioner had such a lien in the first instance. A lien on freights (unlike the shipowner's possessory lien on cargo) exists only by reason of an express grant in the charter agreement. Such grant was absent here. [See: *Oceanic Trading Corp. v. Freights, Sub-Freights and Demurrage of Vessal Diana, supra*, 423 F. 2d 1 at 5; *In re North Atlantic & Gulf Steamship Co., supra*, 204 F. Supp. 899, at 904 and 906; *Ocean Cargo Lines v. North Atlantic Marine Co.*, 227 F. Supp. 872, 880 (S.D.N.Y. 1964); *Hall Corp. v. Cargo ex Steamer Mont Louis*, 62 F. 2d 603, 605 (2d Cir. 1933) and cases collected; Gilmore & Black, *Op. Cit.*, p. 517, note 103 and cases cited]. The Court of Appeals also was not required to decide what portion of the monies paid to the Bank (which represented the total purchase price of the steel shipped) actually were freight monies. Respondent contends that no portion is so identifiable and that therefore no lien could ever exist.

Petitioner asserts (Petition, p. 8) that the foregoing rule is applicable only to bona fide holders in due course of negotiable bills of lading. That argument is not supportable. A shipowner has no lien upon frieghts which have been prepaid whether such payment has been made to the charterer, its assigns or creditors, or to any other third person [See: *Marine Traders, Inc. v. Seasons Navigation Corp., supra,* 422 F. 2d 804 at 806; *In re North Atlantic & Gulf Steamship Co., supra,* 204 F. Supp. 899 at 906; *Luckenbach Overseas Corp. v. Subfreights of S. S. Audrey J. Luckenbach,* 232 F. Supp. 572 at 577 (S.D.N.Y. 1963); *Schirmer Stev. Co. Ltd. v. Seaboard Corp.,* 306 F. 2d 188 (9th Cir. 1962); Gilmore & Black, *op. cit.,* p. 208; Stephens, *op. cit.,* p. 200].

Petitioner's oblique suggestion (Petition, p. 8) that the decision here conflicts with that in *The Solhaug,* 2 F. Supp. 294 (S.D.N.Y. 1931) is without merit. In *Solhaug* a shipowner sought to impose a lien on the unpaid portion of subfreights still held by a consignee of a sugar shipment. *Solhaug* did not involve, as does the case at bar, a shipowner's claim of lien upon freights previously paid to and in the possession of a third party. Moreover, several cases of the Second Circuit, cited above, are in accordance with the result reached here by the Ninth Circuit Court of Appeals.

Long accepted, well established principles of admiralty law were applied by the Court of Appeals in the case at bar. The decision below presents no conflict with prior decisions of this Court or other Circuits. Nor does the present case raise issues of such importance as to even arguably warrant review by this Court on certiorari.

II.

The Court of Appeals Decided No Important Question of Federal Law Warranting Certiorari. Review of the Jurisdiction Issue Would Be Hypothetical and Advisory. The Decision Below Created No Conflict in Its Determination of Jurisdiction.

A. The Jurisdictional Issue Is Illusory Since Petitioner Prevailed Thereon; Any Decision of This Court Would Be Advisory Only.

In an approach which is long on ingenuity but short on rationality, Petitioner proposes that this Court should grant certiorari on the basis of the Court of Appeals' decision on the jurisdictional issue (Petition, pp. 9-11). Since Petitioner prevailed on that issue in the Court of Appeals, its present argument is surprising, if not bewildering.

To understand the distortion it should be recalled that Petitioner argued below that absent a maritime lien, it had an equitable claim in the nature of a constructive trust. Respondent Bank, on the other hand, contended that the constructive trust claim was not within the admiralty jurisdiction of the Court, and that in any event the findings of the trial court did not support the imposition of such a trust.

The Court of Appeals held that the constructive trust claim was an independent equitable claim (rather than one incidental to admiralty jurisdiction). In so holding the Circuit Court's decision was in accordance with that of this Court in *Swift & Co. Packers v. Compania Columbiana Del Caribe S.A.*, 339 U.S. 684, 690 (1950) and its own prior decision in *Putnam v. Lower*, 236 F. 2d 561, 569 (9th Cir. 1956). The Court of Appeals went on, however, to *agree with Petitioner* that the District Court had jurisdiction over

Petitioner's equitable claim, basing such juridiction on two alternative grounds, *i.e.*, "pendent" jurisdiction and "diversity" jurisdiction. Thus, as the jurisdictional issue was finally resolved, Petitioner *prevailed* in its effort to have its equitable claim considered on its merits.

Since Petitioner's equitable claim was in fact considered and decided on its merits by the Court of Appeals, it is now irrelevant whether the Court did so under a theory of pendent or diversity jurisdiction rather than in admiralty. In either event, Petitioner prevailed on the jurisdictional issue and had a full hearing on the merits. The granting of certiorari to review the jurisdictional issue would be an entirely hypothetical, academic and advisory exercise by this Court—wholly inconsistent with this Court's settled practice [*e.g.*, *Alabama State Federation of Labor, et al. v. McAdory*, 325 U.S. 450, 461 (1945); *Trailmobile Co. v. Whirls*, 331 U.S. 40, 48 (1947)]. Petitioner having prevailed in inducing the court below to consider its equitable claim on the merits, the granting of certiorari would, in effect, grant appellate review of an issue to the party which was successful on that issue in the lower court—an exercise in which this Court has refused to indulge [*Public Service Commission v. Brashear Freight Lines, Inc.*, 306 U.S. 204, 206-07 (1939)].

B. The Decision Below Created No Conflict.

In holding that the claimed constructive trust was an independent equitable claim, beyond admiralty jurisdiction, the Court of Appeals' decision was in accord with *Swift & Co. Packers v. Compania Columbiana Del Caribe S.A.*, *supra*, 339 U.S. 684, 690 (1950) where this Court said: "Unquestionably a court of admiralty will not enforce an independent equitable claim merely

because it pertains to maritime property." The decision also conformed to the Ninth Circuit's prior decision in *Putnam v. Lower, supra,* 236 F. 2d 561, 569, as well as to other cases in which a court of admiralty has refused to entertain what is essentially an independent equitable claim [*e.g., The Eclipse,* 135 U.S. 599, 608 (1890); *Port Welcome Cruises, Inc. v. S.S. Bay Belle,* 215 F. Supp. 72, 84-85 (D.C. MD. 1963), *Aff'd Sub. Nom. Humble Oil & Refining Co. v. S.S. Bay Belle,* 324 F. 2d 954 (4th Cir. 1963); *F.D. Marchessini & Co. v. Pacific Marine Corp.,* 227 F. Supp. 17, 20 (S.D.N.Y. 1964); *Economu v. Bates,* 222 F. Supp. 988, 991-92 (S.D.N.Y. 1963)].

Petitioner's assertions (Petition, p. 10) that the judgment here conflicts with other decisions cannot be sustained. *Archawski v. Hanioti,* 350 U.S. 532, 536 (1956) was a claim for restitution and unjust enrichment where there had been failure of consideration in a contract of passage; the claim arose as "the result of the breach of a maritime contract". In *Archawski* this Court was not (as here) concerned with a claim sounding exclusively in equity, but rather with one arising within the admiralty. Similarly *Sword Line, Inc. v. United States,* 228 F. 2d 344 (2d Cir. 1955), Aff'd on rehearing 230 F. 2d 75 (1956), Aff'd 351 U.S. 976 (1956), involved a claim clearly maritime in nature; there the court passed on an overpayment of charter hire.[5]

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[5]Notwithstanding its colorful language, *Compania Anonima Venezolana De Navacione v. A. J. Perez Export Co.,* 303 F. 2d 692 (5th Cir. 1962)—cited at page 10 of the Petition—has no relevance here. The issue in *Perez* was not one of jurisdiction but simply whether a berth agent, as the subrogee of a carrier, was entitled to collect freight charges from a shipper where the shipper had previously paid a freight forwarder who in turn failed to pay the carrier or the agent.

The Court of Appeals correctly concluded that the constructive trust claim constituted a separate basis for recovery and was therefore an independent equitable claim beyond the admiralty jurisdiction. Therefore even had the court declined to exercise jurisdiction on other bases, certiorari would not be warranted. But such jurisdiction was exercised and the matter fully considered on the merits, and *a fortiori* certiorari should be denied.

C. The Imposition of a Constructive Trust Was Properly Denied.

Having decided the jurisdictional issue favorably to Petitioner, the Court of Appeals addressed itself to the merits of the constructive trust claim and held that "the district court's findings do not support imposition of a constructive trust for [Petitioner's] benefit" (Petition, Appendix A, p. 10). In so holding the Court of Appeals did not, as Petitioner now argues, assume the role of a trier of fact (Petition, p. 11); rather the Court of Appeals accepted the findings of the District Court, and held that those findings were insufficient, as a matter of law, to impose a trust upon one creditor in favor of another creditor.

Hornbook law dictates that a constructive trust may be imposed only where one acquires property to which he is not entitled by reason of fraud, accident, mistake, undue influence or the violation of an express trust or confidential relationship [Bogart, *Trusts & Trustees* (2d Ed. 1965) §§471-475; *Scott on Trusts* (3d Ed. 1967) Vol. V, §462.2; Restatement, *Restitution*, §160 and Comments; 89 C.J.S. *Trusts*, §139, pp. 1015-1024; California Civil Code §2224.] The findings of the District Court established none of the foregoing grounds for the imposition of a constructive trust.

Petitioner suggests (Petition, pp. 10-11) that the Court of Appeals' exercise of pendent or diversity jurisdiction interjected a choice of laws issue into the constructive trust claim which would not have been present had admiralty jurisdiction been exercised. The argument lacks both candor and merit. *First*, Petitioner itself argued the applicability of California law in urging the merits of its claim;[6] *Second*, California law fully accords with generally accepted principles of constructive trust.

The court below was confronted with two creditors, one of whom was paid and the other not. These circumstances do not create a constructive trust [*McKey v. Paradise*, 299 U.S. 119, 122-23 (1936); *Woodruff v. Coleman*, 98 A. 2d 22 (D.C. 1953); *Zirker v. Baber*, 161 Cal. App. 2d 355, 327 P. 2d 63 (1958); 1 Bogart, *Trusts & Trustees* (2d Ed. 1965), §19, p. 129].

Resolution of the merits of the constructive trust claim essentially involved the application of routine and established principles of law to an admitted set of facts concerning the claims of two creditors against the same debtor. The day has long passed when matters of this nature should burden this Court's calendar. No important question of Federal Law warrants the granting of certiorari.

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[6]The opinion of the Court of Appeals makes note of the fact that both sides argued the applicability of California substantive law to the merits of the constructive trust claim (Petition, Appendix A, p. 10). Petitioner cited both California statutory and decisional law in its brief before the Court of Appeals.

Conclusion.

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Dated: May 3, 1971.

Respectfully submitted,

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